

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HAROLD L. SALTILL

Claimant

VS.

RUBBERMAID SPECIALTY PRODUCTS

Respondent

Self-Insured

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Docket No. 211,676

ORDER

Respondent appeals from an Order for additional medical treatment entered by Administrative Law Judge Jon L. Frobish on December 9, 1998.

ISSUES

The ALJ ordered respondent to pay for post-award medical treatment to claimant's right shoulder. Respondent contends the ALJ erred or exceeded his jurisdiction in doing so because the original Award awarded permanent disability benefits for bilateral carpal tunnel and left shoulder injuries but did not award permanent impairment benefits for injury to the right shoulder. According to respondent, this fact precludes an order for post-award medical treatment to the right shoulder. Respondent also disputes the order for payment of claimant's attorney fees.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Order by the ALJ should be affirmed in part and reversed in part.

Claimant originally alleged injury to both hands and shoulders occurring October 1994. At the regular hearing in this case, claimant testified to symptoms in both shoulders and the evidence indicated claimant discussed problems with his right shoulder with the treating physician. Claimant also testified that the physician indicated he would simply have to live with his right shoulder problems. Neither the treating doctor nor Dr. Ernest R. Schlachter, who also testified in this case, assessed permanent impairment of function of the right shoulder.

Respondent now contends that the award for medical treatment for the right shoulder is barred by the doctrine of *res judicata*. Respondent also contends that the present problems did not arise out of and in the course of employment.

The Appeals Board disagrees with both contentions. The fact that claimant did not have a permanent impairment shown in the original claim does not rule out the possibility of

having an underlying injury to the right shoulder. In fact, the evidence suggests that he did. This case appears to be different from others where the original award finds the injury is only temporary. In this case, the award did not find permanent functional impairment but does not find the injury to be temporary. The current claim for medical treatment is not barred by any doctrine of *res judicata*. In addition, the evidence presently before the Board indicates the current need for medical treatment probably is from the original injury. Therefore, the Board concludes claimant's need for medical treatment does arise out of and in the course of his employment.

Finally, respondent contends that the ALJ erred or exceeded his jurisdiction in awarding attorney fees in this case. Respondent points out that K.S.A. 44-536 provides that if the post-award services result in additional disability compensation, the attorney fees are to be paid from that additional compensation. The application for additional medical treatment was, in this case, part of a review and modification proceeding which asked for an increase in the permanent disability benefits. While the Board does not expect that attorney fees should be taken from the compensation for medical treatment, the Board does agree that this proceeding may yet award additional permanent disability benefits and, if it does, the attorney fees should be paid out of those benefits. The award of attorney fees at this point in the proceeding is, therefore, premature. That portion of the Order should, therefore, be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that that portion of the Order entered by Administrative Law Judge Jon L. Frobish on December 9, 1998, granting claimant's request for medical treatment for the right shoulder should be, and the same is hereby, affirmed. That portion of the Order which awards attorney fees should be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of February 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Charles W. Hess, Wichita, KS
Terry J. Torline, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director